Supreme Court, U.S.
FILED
JUN 29 1999
CLERK

(3)

No. 98-1036

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF ILLINOIS,
Petitioner,

vs.

SAM WARDLOW,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF WAYNE COUNTY PROSECUTING ATTORNEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTION

I.

DOES A PERSON'S SUDDEN, UNEXPLAINED, AND UNPROVOKED FLIGHT FROM A CLEARLY IDENTIFIABLE POLICE OFFICER PROVIDE REASONABLE GROUNDS TO BELIEVE THAT CRIMINAL MISCHIEF IS AFOOT?

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INTEREST OF THE AMICUS

Amicus is the Prosecuting Attorney for Wayne County, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. Charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, the outcome of the current litigation is a matter of primary interest to *Amicus*, as its outcome will directly affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties. However, *Amicus* has obtained Petitioner's permission to file a supporting brief on its behalf.

STATEMENT OF THE CASE

Amicus relies upon the parties to provide this Court with the particulars of the instant case.

SUMMARY OF ARGUMENT

Under any common understanding of the Fourth Amendment concept of "reasonable search and seizure", unprovoked flight from the presence of police invites their pursuit and justifies the temporary detention of the one fleeing, for purposes of discovering the reason for such behavior: A police officer would be foolishly naive to ignore such an event, and it provides an objective basis for a reasonable officer to suspect criminal wrongdoing.

ARGUMENT

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> *"The wicked flee when no man pursueth...."*
> PROVERBS, 28:1

This case squarely presents a recurring question the Court left open in *Michigan v Chestermut*, 486 US 567 (1988) and *California v Hodari D*, 499 US 621 (1991) — namely, whether a citizen who bolts from the presence of a uniformed police officer gives the officer any reason to suspect that foul play is afoot, and any reason to detain the citizen to see whether the suspicions have a basis in fact.[1]

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[1] The lower court holding suggests a conceptual problem underlying cases such as this one: the Illinois Supreme Court appears to assume that police must have evidence of "some independently suspicious circumstance" to corroborate any "inference of a guilty conscience associated with flight at the sight of the police." *People* v *Wardlow*, 183 Ill 2d 306; 233 Ill Dec 634; 701 NE2d 484, 486 (1998). However, *Terry* is not so restrictive: in fact, the Court took care to note that it based the holding on the "Fourth Amendment's general proscription against unreasonable searches and seizures," *Terry* v *Ohio*, 392 US 1, 20 (1968), and found that the critical point was not proof of any specified criminal acts, but rather an objectively reasonable cause for concern. *Terry*, at 20-24. And other jurisdictions note that the gravamen of "reasonable suspicion" is not proof positive, but "ambiguity"—specifically, some objectively reasonable basis for drawing an inference of wrongful conduct. *See, eg, State* v *Anderson*, 155 Wis 2d 77, 84; 454 NW2d 763, 765 (1990); *Platt* v *State*, 589 NE2d 222, 226 (Ind, 1992).

Amicus also notes that requiring *corroboration* of suspicious circumstances — while necessary to establish proof beyond a reasonable doubt at trial or probable cause for arrest — appears inconsistent with the very notion of "suspicious circumstances" in the first place. By their very nature, "suspicious circumstances" giving rise to "reasonable suspicion" will be ambiguous: if no ambiguity existed, we would have

Given the holding below, this Court must intervene to broaden a curiously narrow construction of the word "reasonable" in the context of the Fourth Amendment, and return courts to the common understanding of the word. In doing so, the Court will decide whether our Constitution permits police to use common sense in situations when an officer sees someone bolt from his presence — *ie*, whether the only constitutionally reasonable course is for the officer to shrug his shoulders and continue about his business; or whether the Constitution permits him to discover what the problem may be, and why someone would flee from what would otherwise be a non-threatening, reassuring presence.

Thus, the controlling question in this case is whether a policeman's act of detaining a citizen who flees from his presence, for purposes of investigating the cause of his action, constitutes an unreasonable response to the citizen's flight under the Fourth Amendment.

A.
HISTORY AND ETYMOLOGY
1.
Digression and Resolution

In 1791, newly independent and with a vivid memory of the oppressions of the Crown that fueled their Revolution,[2] the practical idealists who founded this Nation inserted into

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either unambiguously innocent conduct, or probable cause to arrest. And the whole point of investigating in the first place is so that the police can *garner* the corroboration needed to resolve the ambiguity, one way or the other.

[2]Actually, the historical record suggests that the Revolution stemmed as much from the colonists' reluctance to pay the costs of protecting themselves from the French and the Indians as from any real tyranny by the Crown. See, Middlekauf, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (1982), pp 49-93, for a good summary of how British clumsiness and Yankee parsimony contributed to popular support for the ensuing revolt. See also, Trevelyan, THE AMERICAN REVOLUTION (MORRIS ED) (1964), pp 1-56.

its new Constitution a protection from the potential abuses of a strong central government. Inserted into the new charter by early amendment,[3] the Fourth Amendment sought to prevent the intrusiveness that came by way of judicial writ, which had allowed agents of the Crown to conduct wide-ranging and wholesale searches seeking to discover violations of the law. As adopted, the provision read:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

As with many advances in the Law, the Fourth Amendment arose in response to specific and documented abuses, and examining its historical context shows its general nature and intended limits. Most scholars agree that the Fourth Amendment's warrant requirement stemmed from opposition, both here and in England, to the British Government's use of general warrants as a tool to enforce government policy, and this Court has often noted the connection between such abuses and the language of the Fourth Amendment's warrant clause, *see, eg, Boyd* v *United States*, 116 US 616, 624-633 (1886); *Marcus* v *Property Search Warrant*, 367 US 717, 724-729 (1961); *Frank* v *Maryland*, 359 US 360, 363-366 (1959); *Stanford* v *Texas*, 379 US 476, 481-486 (1965), remarking in *Boyd* that although such practices "may suit the purposes of despotic power, [they] cannot abide the pure atmosphere of political liberty and personal freedom." *Boyd, supra* at 631-632. Drawing on this heritage, the Court has construed the scope and purpose of the Fourth Amendment as a bulwark against

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[3]*See* I STAT 97.

governmental intrusions, finding that it gives citizens the right to "shut the door" on government officials who demand entry into their homes and property without proper authorization. *Frank* v *Maryland*, *supra* at 365.

A common thread links our early cases with the abuses of the colonial writs of assistance — the fear that unrestricted governmental power to force entry into private dwellings will lead to tyranny, by stifling the voices of nonconformity. Such fears led this Court to hold the "security of one's privacy against arbitrary intrusion by the police" to be a fundamental right guaranteed by the Fourteenth Amendment, *Wolf* v *Colorado*, 338 US 25, 27 (1949); *Mapp* v *Ohio*, 367 US 643, 650 (1961), and to the general rule that official entry onto private property needs judicial authorization. *Michigan* v *Tyler*, 436 US 499 (1978). In fact, the early history of the Fourth Amendment suggests that its main concern was the forced entry and search of a dwelling. Earlier abuses had fired opposition to the colonial writs of assistance; and early decisions banning the use of unlawfully seized evidence show the Court's sensitivity to governmental invasions of private homes: In *Weeks* v *United States*, 232 US 383 (1914), the Court would ban from use in federal courts evidence unlawfully seized during a warrantless, and hence unlawful, entry into the citizen's home. And in *Agnello* v *United States*, 269 US 20, 33 (1925), the Court rejected the notion that the unquestioned existence of probable cause alone provided blanket justification for a warrantless entry into a home, holding that the mere belief, "however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." *See also*, *Gambino* v *United States*, 275 US 310 (1927); *Byars* v *United States*, 273 US 28 (1927). *See generally*, LaFave & Israel, CRIMINAL PROCEDURE, (1984), Ch 3, pp 132 ff.

Thus, the early cases suggest a preoccupation with official entries into private property, stemming from Coke's maxim that "every man's house is his castle." Coke, THIRD INSTITUTE; H. Broom, LEGAL MAXIMS, 321-329. *Cf*,

Semayne's Case, 5 Co Rep 91a; 77 Eng Rep 194 (KB, 1603). And while extending the concept of "reasonable seizure" to persons outside a dwelling is well within the language of the Fourth Amendment, the Court came to recognize that the differences in circumstance mandated a difference in approach: The Constitution did not, after all, proscribe attempts at maintaining public order; and one venturing into public assumes a continuing duty to behave in accordance with the dictates of civilization. Moreover, while history shows that permitting the discretionary invasion of private property carries with it the seeds of tyranny, the infinite variety of human conduct requires that the State have the flexibility needed to maintain the public peace and enforce some minimal standards of civility. Therefore, where one's conduct gives the police reasonable grounds to believe he has committed a crime, the common law, recognizing the compelling public interest in law enforcement, justified intruding upon his liberty interests in order to effect an arrest,[4] 4 Blackstone, COMMENTARIES, 292; *Samuel* v *Payne*, 1 Dougl 359; 99 Eng Rep 230 (KB, 1780); *Kurtz* v *Moffitt*, 115 US 487 (1885); and the Constitution, building upon this heritage, concurred. *United States* v *Watson*, 423 US 411 (1976). Accordingly, where the police have reasonable grounds to believe that a specific person has committed a crime, they may arrest him without a warrant. *United States* v *Watson*, *supra*. *Cf*, *Draper* v *United States*, 358 US 307 (1958)(Holding "probable cause" synonymous with "reasonable grounds).

Still, the power to arrest extends the powers of the police no further than that of a magistrate to order the arrest in the first place. *Gerstein* v *Pugh*, 420 US 103 (1975). And for years, courts construed any significant intrusion on one's right

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[4]Actually, the common law also placed substantial burdens on the citizenry, to help the authorities apprehend lawbreakers. See 4 Blackstone, COMMENTARIES, 293, for an explanation of the role of the "hue and cry."

of free passage to be an arrest — judging the legality of that intrusion by determining whether probable cause existed at the moment of the stop, rather than by any facts discovered later. *Henry* v *United States*, 361 US 98; 80 S Ct 168; 4 L Ed 2d 134 (1959). This forced courts to view any police-citizen interaction in one of two ways: either as a full arrest, subject to the probable cause standard; or as a non-event, unrelated to the restrictions or limitations of the Fourth Amendment.[5] However, the ambiguities of human interaction proved such rigidity inadequate to the task of maintaining order in a complex and changing society, forcing the Court to modify its approach. And in *Terry* v *Ohio*, 392 US 1 (1968), the Court would make a fundamental shift in the focus of the Fourth Amendment that leads us to the case at hand.

In *Terry*, a veteran police officer had observed some men standing on a street corner, going through an elaborate ritual of strolling casually past a store window and looking inside, then returning to the corner. After they repeated this ritual continuously for 10 or 12 minutes, the officer concluded that they might be planning a robbery, and that it was his duty to investigate the matter further. Approaching the men, he identified himself as a police officer and asked for identification; fearing they might be armed, he patted down the outside of Terry's clothing and found a gun. Frisking the others, he found a gun on one of them and took them to the

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[5]One must also remember that, less than a decade earlier, this Court had radically altered the legal landscape with its landmark decision in *Mapp* v *Ohio*, 367 US 643 (1961).

Considering the matter from a practical standpoint, it was one thing for federal courts to exert control over federal law enforcement, limited jurisdictionally to prosecuting federal crimes; it was quite something else to try to exercise such control over local law enforcement, which had the responsibility of maintaining order and keeping the peace in a wide variety of local environments. See the concurring opinion of Justice Harlan in *Coolidge v New Hampshire, supra*, expressing concern that the concerns and problems of local authorities may serve to distort the principled application of the Fourth Amendment.

police station, where Terry and a companion were formally charged with carrying concealed weapons. On the defendants' motion to suppress evidence, the trial court dismissed the notion that the officer had probable cause to arrest the defendants before he discovered the weapons; however, distinguishing between an investigatory stop and a full arrest, the court found that the officer had reasonable grounds to believe that the defendants were "conducting themselves suspiciously," and therefore had the right to make further inquiry into their actions. And given his right to investigate, it followed that he had the right to conduct a frisk for weapons, in order to guarantee his own safety.

On *certiorari*, this Court affirmed. Rejecting claims that the Fourth Amendment applied only in cases of full custodial arrest, the Court found that a "seizure" in the constitutional sense occurs whenever a police officer restrained the freedom of a citizen to go his own way. And the Court deemed that it require "torture of the English language" to find that "a careful exploration of the outer surfaces of a person's clothing...in an attempt to find weapons is not a 'search.'" *Terry v Ohio, supra* at 16. Even so, the Court carefully distinguished the two severable Clauses of the Fourth Amendment — the "Warrant Clause" and the "Reasonableness Clause" — to apply the policies and protections of the Constitution in a situation which did not lend itself to the time constraints of legal process:

> "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case....[W]e deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to

> the warrant procedure. Instead, the conduct involved must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry v Ohio*, at 20.

Noting that courts can assess a search's reasonableness of aonly by "balancing the need to search against the invasion which the search entails," *Terry*, at 21, quoting *Camara* v *Municipal Court*, 387 US 523, 535-536 (1967), the Court stressed the need for an objective standard of review, since relying upon the officer's subjective good faith would reduce the Fourth Amendment to mere words. Thus, when judging whether the specific facts available to the police justified a particular intrusion, courts would ask whether a hypothetical "reasonable man" would find that "the facts available to the officer at the moment of the seizure or the search warrant[ed] a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, at 21-22.

Given the general public interest in "effective crime prevention and detection," *Terry*, at 22,[6] the Court found it constitutionally unobjectionable for an officer to approach and briefly detain a citizen on the street, even in the absence of probable cause, so long as he has observed "unusual

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[6]Actually, the concept of "reasonable search and seizure," need not be hostile to efforts to enforce the law. US CONST, Preamble. *Cf*, Rousseau, THE SOCIAL CONTRACT, (Penguin Ed, 1988), pp 64-65 (Noting that Man acquires freedom only through the institution of Law). The primary purpose of government is, after all, protecting its citizens; and however honest or idealistic it might be, a government which fails to fulfill this fundamental goal has failed in its most basic function. It follows that the Constitution cannot demand law enforcement methods which are ineffective to enforce the law, unless the Law itself wishes to abdicate its position of ruling authority. And the abdication of the Rule of Law would lead either to tyranny or anarchy — the current state of affairs in Somalia being witness to what happens whenever the governing authority cannot, or does not, govern. *Cf*, Hobbes, LEVIATHAN, (III Bohn Ed, 1839), pp 110-118 (Noting that "where there is no common power, there is no law").

conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry, supra* at 30. In such cases, a brief investigative detention to confirm or dispel his suspicion is reasonable, since the overriding public interest in preventing crime outweighs the minor inconvenience to the person detained.

The pivotal point of reasonableness established, the Court has since grappled with the limitations and logical consequences of its approach. But "reason" by its very nature depends not on some immutable formula but upon the "totality of the circumstances — the whole picture," *United States v Cortez*, 449 US 411, 417 (1981). Thus, the existence of "reasonable suspicion" will depend not upon the possibility of an innocent explanation for observed conduct, but rather upon a confluence of factors which, taken together, warrant further investigation. *United States* v *Sokolow*, 490 US 1 (1989). And as this Court noted in *Cortez*, courts must realize that they are dealing not in "hard certainties," but rather in relative probabilities:

> "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same — and so are law enforcement officers." *Cortez*, at 418.

Accordingly, while "reasonable suspicion" as a concept still eludes successful articulation, *compare, eg, Sokolow, supra* with *Florida* v *Royer*, 460 US 491 (1983), the cases agree that "reasonable suspicion" falls some degrees short of "probable cause," *Sokolow* at 10; *Royer* at 500, and that courts must make some concessions to the same ambiguities of life that make articulating the parameters of "reason" such a daunting task.

However, applying the concept of "reasonableness" to police conduct presents the danger of judicial chaos: reason, like beauty, is often a subjective judgment; and without a clear consensus on the contours of "reason," the unrestrained

judicial application of a "rule of reason" will lead to law enforcement by the whims of judges just as surely as vesting unlimited discretion in the police would place the liberty of all "in the hands of every petty officer."[7] Even so, to the extent that language conveys a common meaning, we may limit the judge's discretion by words; and so long as the traditions of the Law require adherence to precedent,[8] and our search for Law seeks underlying principles of common application rather than decisions based on the subjective preferences of the individual jurist, judging police actions by applying the concept of "reason" gives courts a needed flexibility in dealing with situations as infinitely diverse as life itself, and to which no single rule crafted by the limited human mind can address in all its permutations.

Toward this end, this Court analyzes police-citizen encounters using a three-tier framework in applying the Fourth Amendment: Initially, police may approach any citizen on the street for the purpose of asking him questions, without any level of justification under the Fourth Amendment; the citizen, however, is equally free to ignore the police and proceed upon his way unrestrained — and his mere refusal to cooperate provides no basis for his detention. *Florida* v *Royer*, 460 US 491, 497-498 (1983); *United States* v *Mendenhall*, 446 US 544, 555 (1980). *Cf, Davis* v *Mississippi*, 394 US 721 (1968); *Brown* v *Texas*, 443 US 47 (1979). The next level of encounter is the prototypical *Terry*-stop — permitting police to detain a citizen and search him for offensive weapons, but requiring the officer to have

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[7]Cf, *Frank v Maryland, supra* at 364, quoting Tudor, LIFE OF JAMES OTIS (1823), p 66.

[8] Actually, one surveying American law in the 1960's might find reason to question the role of precedent in American jurisprudence. *Compare, eg, Mapp v Ohio, supra* with *Wolf v Colorado, supra*, or *Malloy* v *Hogan*, 378 US 1 (1964) with *Twining* v *New Jersey*, 211 US 78 (1908), *Snyder* v *Massachusetts*, 291 US 278 (1936) and *Cohen* v *Hurley*, 366 US 117 (1961).

a reasonable, articulable suspicion of wrongdoing. *Terry v Ohio, supra; Florida v Royer*, at 498-501; *Brown v Texas*, at 51. And the third level of encounter is a full-blown arrest — requiring probable cause. *Dunaway* v *New York*, 442 US 200 (1979); *Florida v Royer*, at 499-501. Thus, the applicable standard of justification will vary, depending on the intrusiveness of the encounter, since the concept of "reasonable search and seizure" imposes different standards for different levels of intrusions, *cf, Florida v Royer*, at 500; *Terry v Ohio*, at 19.

Unfortunately, in Law as in many disciplines, elemental concepts often go unexamined, and while the Court developed a general test for determining the question of "seizure," *United States v Mendenhall*,(Would a reasonable person in similar circumstances believe he was not free to leave), the Court's preference for the "case by case" resolution of basic principles ordained that progress would be slow. Not until *Chesternut*, for example, did the Court explore the parameters of a "seizure" in the context of a "chase;" and even there, the Court deferred making a definitive decision for another three years, in *Hodari*.

In this case, the Court confronts a question that it has twice deferred — namely, whether a citizen who flees at the mere sight of the police gives the officers reason briefly to detain him. The accumulated folk-wisdom of several thousand years, noting that "[t]he wicked flee when no man pursueth," PROVERBS, 28:1, suggests that the answer is an unqualified "yes," and a wealth of authority from more contemporary sources seems to agree. *See, eg, State* v *Anderson*, 155 Wis 2d 771; 454 NW2d 763 (1990); *Platt* v *State*, 589 NE2d 222 (Ind, 1992). But this case will decide whether our understanding of the Fourth Amendment remains consistent with such ancient wisdom, or reflects a more modern deconstruction of the concept of "reasonableness,"

within the context of the Fourth Amendment.[9]

2.

History, Language, and the Constitution

"Human history becomes more and more a race between education and catastrophe."

H. G. Wells, THE OUTLINE OF HISTORY (1949 Ed), p 1198.

Given the specific limitation of the Fourth Amendment to "unreasonable searches and seizures," *Amicus* submits that we must address the Framer's conception of reasonableness before we can analyze the Fourth Amendment's application to the present case. After all, unless one adopts the notion that the Judicial Powers of government include the right to rewrite any text which does not accord with the Judiciary's institutional or subjective preferences,[10] we must accept the limitations of language placed upon words enacted into law, for rejecting such notions of judicial limits means rejecting

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[9] Much of the case law on point stems from civil actions. *See, eg, Tennessee v Garner, supra, Brower v Inyo County, supra, Malley* v *Briggs*, 475 US 335 (1986).

Though running the risk of converting the Fourth Amendment from a source of protection for citizens against a potentially abusive government into a source of income for a potentially abusive plaintiff's bar, this could lead one to wonder if the developing body of civil law has undercut deterrent rationale of exclusionary rule enough to cast into doubt its wisdom and legitimacy. This is a question which this Court has noted in the past, and may wish to revisit in the future. *Cf, Stone* v *Powell*, 428 US 465, 496 (1976)(Burger, CJ, concurring). *See also, Wolf v Colorado, supra* at 28-29 (Noting the wide-scale rejection of the exclusionary rule throughout Anglo-American jurisprudence).

[10]Curiously, many modern commentators appear to adopt such a view. *See, eg,* Brest, *The Misconceived Quest for the Original Understanding*, 60 BUL REV 204 (1980); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV L REV 1189 (1987); Steiker, *Second Thoughts About First Principles*, 107 Harv L Rev 820 (1994). Whether such a view reflects enlightened scholarship, the commentators' own subjective political preferences, or a fundamental distrust of the results of democratic self-government, remains to be seen.

the wisdom, as well as the enacted Law, of prior generations.

The historical record shows that the imprecision of language was a problem familiar to the Framers of our Constitution. Madison, for example, wrote perceptively of the limitations of words as a medium of communication. "The use of words is to express ideas," he wrote in THE FEDERALIST:

> "Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that...the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty Himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." THE FEDERALIST, No. 37.

Within the limits of human language, courts have a unique power and a burdensome responsibility: while the Judiciary gives substance to Law, through the power of adjudication, a court's first responsibility is to give form and substance to the Lawmaker's intent. While this implies the need for constant attention to detail, applying the rules of society in the context of the infinite diversity of creation, it also requires the judge to apply not his own subjective preferences, but those of the Lawmaker — to adopt not the construction best suited to the judge's personal conception of Justice, but rather to enforce the law given him by statute,

constitution, or precedent. THE FEDERALIST, No. 78. *See, eg, Printz v United States*, 521 US 98 (1997); *Carroll v United States*, 267 US 132, 149-150 (1925.

While it is unlikely that the Framers anticipated the revolution in transportation and communication that has transformed our country, we can often apply their underlying principles of government to many cases arising today, and when this is possible, there is no need for further guidance from the Legislature or the people. However, a court is never free to disregard History in favor of furthering a judge's subjective point of view. And where the policies underscoring the provisions of the Constitution conflict with a judge's own preference, it is the Constitution — the Framers' policy choices, as reflected in the Framers' own language — which must control. THE FEDERALIST, No. 78. *Cf, Printz v United States*; *Carroll v United States*.

History teaches us that the Framers were, in many respects, sons of the French Enlightenment, Durant, ROUSSEAU & REVOLUTION (1967), p 867, and thus products of their era's admixture of rationality, tolerance, and secular optimism that elevated "reason" into a mainstay of human discourse: in this view, Man was flawed but perfectible, and the use of human reason to the resolution of problems seemed to provide the key to all human endeavors.[11] Still, the

[11]Actually, their application of reason to contemporary problems often contains lessons for our own epoch — in fields as diverse as economics, *see*, A. Smith, THE WEALTH OF NATIONS (1776)(Noting the concept of enlightened self-interest), politics, *see*, Montesquieu, THE SPIRIT OF THE LAWS, (1748)(Postulating an animating "spirit" for each major system of governance — "honor" for monarchies; "virtue and civic consciousness" for democracies; and "fear" for despotism — and noting the dire consequences of each permitting a weakening of its defining spirit), or religion. *See*, Hume, DIALOGUES CONCERNING NATURAL RELIGION (1779)(Positing that absolute certainty is possible only in field of mathematics; all else, depending upon "matters of fact," are open to question).

On the other hand, as one authority has noted, in this era of hope and

Enlightenment remained, at its core, a religious age, Gay, AGE OF ENLIGHTENMENT (1966), p 31, and contemporary philosophers struggled with efforts to find common ground between reason and faith: the Cambridge Platonists, for example, saw the two as complementary, rather than conflicting, seeing in Christianity the practice of reason, virtue, and mystical contemplation. Gay, at 31-32.

Viewed through the lens of History, there seems no basis to conclude that the Framers would have regarded a police officer's act of detaining a citizen who bolted from his presence to lack a basis in reason: as they would have been well acquainted with PROVERBS 28:1, it would have seemed unremarkable that a constable would seek to learn the reason why someone might flee, rather than trying to rationalize the behavior. Moreover, in their less secular era, many would have deemed the wisdom contained in Proverbs to be revealed word of God, and their conception of public duty in a democracy would have included order and obedience to greater authority. *See*, THE FEDERALIST, No. 26 (Noting the "citizens of America have too much discernment to be argued into anarchy" and applauding the "deep and solemn conviction in the public mind that greater energy of government is essential to the welfare and prosperity of the community"). It is unlikely that they would have regarded

optimism "the difference between open-mindedness and gullibility was often indiscernible," Gay, at 65, and some Enlightenment thinkers are more valuable for providing a cautionary tale, rather than food for thought: one such visionary in the field of law was Johann Lavater, who specialized in the "science" of physiognomy — the belief that one's outward appearance was a reliable indication of character. He claimed the ability to spot a murderer merely by studying his face, and advocated moving courts past the orthodox, unenlightened forms of 18th Century jurisprudence, since all judges had to do was follow certain "physiognomic" rules to tell whether an accused was guilty or innocent. Gay, at 68. Though grateful to be spared the dubious benefits of some "cutting edge" 18th Century science, *Amicus* occasionally harbors doubts about some forms of "pseudo-science" in our own day.

flight from a constable to be an indication of anything other than a guilty conscience — and inconceivable that they would have deemed it a cause for the constable to avert his eyes, rather than move to protect the community he was sworn to serve. It strikes *Amicus* as equally inconceivable that they would have found the degree of intrusiveness stemming from the mere presence of an officer on a public street to be a cause of concern[12] — except to one with a guilty conscience, to whom any approach will be a threat, and apprehension anticlimactic. *Cf*, Poe, THE TELL-TALE HEART, (1845).

Thus, on the basis of the Framer's choice of language, it appears that the lower court erred in deciding this case, and that this Court should rectify the matter without further delay.

B.

PARADIGMS LOST

"The laws of a nation form the most instructive part of its history."

Edward Gibbon, THE DECLINE AND FALL OF THE ROMAN EMPIRE (1776)

At risk of being lost amid the points and counterpoints of law professors, commentators, and litigants, it appears to *Amicus* that this case presents a simple fact pattern with deceptively wide-ranging ramifications — for the legal resolution of the pattern will speak volumes about our legal institutions, about the kind of Society we are today, and the kind of Society we may become in the future. Therefore, let us consider the ramifications of two conflicting responses to the following paradigm:

> *A police officer, walking through a crowd on busy street, smiles and greets the passers-by as they go about their business. As one young man calmly turns*

[12]We might also note that for the first 174 years of this Country's existence, the notion that the Fourth Amendment could limit the ability of local authorities to enforce law and order on their own streets was a concept alien to the Federal Constitution. *Compare, eg, Mapp v Ohio,* with *Wolf v Colorado,* and *Irvine v California.*

> *to face the officer, a look of abject panic crosses his face — and immediately, he turns and bolts down the street, running away from the officer as fast as he can.*

As this case discloses, there are two basic responses to such an occurrence:

(1) *"Isn't that interesting," the officer says to himself, as he continues walking.*

(2) *"Stop!" commands the officer, who pursues and stops the young man to find out why the latter is running from him.*

To the extent that the Law commands one response over the other, the ramifications are telling:

1.

"See no Evil...."

The defense argument,[13] and the Illinois Supreme Court,

[13]Respondent also claims that Petitioner favors a constitutional rule that "any person who avoids the police in a high crime area may be stopped for investigation." BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7. Such an overstatement of the true issue strikes *Amicus* as telling: It is, after all, quite likely that most people would rather avoid most interactions with the police — who do, after all, hand out traffic tickets, tell people to "move along," and occasionally make pests of themselves by bossing people about and making people acutely aware of everything they are doing, and everything wrong they have ever done in their lives. But it is one thing for someone to avert his eyes, cross the street, nervously walk in the other direction, or suddenly slow down a car to a speed approaching the speed limit, as a way of avoiding trouble, and Respondent's argument notwithstanding, nobody claims that such actions would justify detaining anybody. Such red herrings should not distract the Court from considering what is truly at issue in this case: the response by a police officer to one who, out of the blue, suddenly bolts from the officer's presence. This action is not one of convenience, nervousness, or unease, but one of panic. And the question at issue in this case is not whether it conclusively establishes the fleeing citizens' guilt, but whether such a panicked reaction, disclosing a self-awareness that the police presence poses a threat of some sort, is worth investigating—or whether the Constitution commands that the police look the other way, and pretend it never happened.

appear to presume a Society in which law enforcement is entirely reactive, unflinchingly credulous, and blissfully naive — and is constitutionally forbidden from being otherwise by the United States Constitution: from the sensible observation that "[f]light is an ambiguous act" and one's "[a]voidance of strangers or the police may stem from motives other than consciousness of guilt," BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7, Respondent reasons that since "both flight and presence in a high crime area are consistent with innocent behavior," they provide no basis for a *Terry*-stop, and that the only appropriate police action is to let the citizen keep running; and the Illinois Supreme Court, having concluded that the right of free association prohibits police from telling people loitering about to "move along," *Chicago* v *Morales*, 177 Ill 2d 440, 459-461; 687 NE2d 53 (1997) *aff'd oth grds* ___ US ___ (No. 97-1121, decided June 10, 1999)[14] reasons because police cannot force citizens to move, they cannot force them to stand still.[15] Both arguments,

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[14]As this Court noted in *Morales*, the problem with the anti-gang ordinance in question was not that it empowered police to instruct citizens to "move along," but that it gave unbridled discretion to the police in determining a citizen's requisite lack of "apparent purpose" to bring them within the reach of the ordinance. Most members of the Court seemed to agreed that a more narrowly drafted ordinance would pass constitutional muster.

[15]This argument strikes *Amicus* as a logical *non sequitur*: just as there is a difference between detaining someone and following him, *California v Hodari D, supra*, *Amicus* perceives a difference between detaining somebody, and watching him run away as fast as his legs can carry him. And the State of Illinois draws no distinction between observing behavior, and drawing an inference from the behavior: the state court's apparent contrary assumption notwithstanding, *Amicus'* research was unable to discover *any* state statute requiring a citizen to stop what he is doing and remain where he is, whenever a police officer appears on the scene; on the other hand, the manner in which the citizen chooses to depart — *eg*, fleeing in panic and confusion, as opposed to taking special care to cross the street *with the light*, so as to avoid a ticket for jaywalking — may say a great deal about what the citizen has been doing in the recent past. *See, eg*, *People* v *Souza*, 9 Cal 4th 224; 36 Cal Rptr 2d 369; 885 P2d 982 (1994).

however, seem premised on the assumption that police must resolve all ambiguities in favor of inaction, and that an individual's interest in Liberty cannot abide any police attention resulting from activities which, though suggesting a consciousness of guilt, provide no corroboration for an inference of wrongdoing. From this premise, it follows that flight alone cannot justify a detention, since flight alone suggests, but does not establish, guilt — and that, absent some other circumstances to confirm the inference of a guilty conscience, police may not view flight at the sight of a police officer as anything more than "the exercise — at top speed — of the person's constitutional right to move on." *People v Wardlow, supra* at 701 NE2d 487, quoting *State* v *Hicks*, 241 Neb 357; 488 NW2d 359, 363 (1992) and *People v Shabaz, supra* at 378 NW2d 460. Accordingly, Respondent argues, where an ambiguous act is consistent with innocent behavior, the police have no grounds to justify a *Terry*-stop. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, p 7; *People v Wardlow, supra*.

Though perhaps not readily apparent, upon reflection the logical implications of Respondent's position are startling: Police activity is, at its core, a necessary evil to be avoided whenever possible, justified only by a *prima facie* showing of citizen misconduct; marginal or ambiguous behavior, while perhaps a source of subjective curiosity, can justify no official action, since the police must resolve all ambiguities, no matter how far-fetched or convoluted, in favor of individual Liberty, rather than the Public Safety; and unless observable conduct confirms an inference of identifiable criminal conduct by an identifiable person, the police — and, as a consequence, the Law — can undertake no action to investigate. This implies that the Law's primary concern will protecting citizens from unwanted interaction with the police,

rather than protecting innocent people from those who would break the Law to do them harm.

The prototype for Respondent's model of the modern law-enforcement officer is, of course, Sgt. Schultz, the sergeant of the guard at Stalag 13. *See*, HOGAN'S HEROES, CBS (1965-1971). Charged with maintaining discipline and order at a German prisoner of war camp during World War II, his characteristic response to anything out of the ordinary — "I see nothing — *noth-thing*!" — is a recurring attempt to avoid trouble for himself through the expedient of denying the evidence of his own eyes and ears: it is, after all, theoretically possible that the routine appearance of inmates at the local *haufbrauhaus*, or the odd assortment of radio equipment, guest stars, and beautiful women that somehow keep appearing at the POW camp is consistent with both German efficiency and order; and while investigating such phenomena might contribute to the successful operation of his camp by uncovering breaches of order and security, it would cause him nothing but grief.

Of course, in the view of at least one student of television, literature, and the Second World War, the reason the character of Sgt. Schultz works is because the inmates are the heroes, fighting against the evil that was Nazi Germany — and Schultz, by ignoring or denying the evidence of his own senses, was helping the forces of Good by rendering Evil comically ineffective. But the comedy would fail if the program depicted an Allied prison camp, where the Germans were the inmates and Schultz' bumbling incompetence was assisting the Nazi effort to enslave the world: in that case, the show would be tragedy, rather than farce — and Schultz would be a pathetic failure, rather than a source of laughter.

Those who prefer that the police emulate Sgt. Schultz, and spend their duty time seeing "nothing — *noth-thing*!", may reveal more than they realize about their vision of Good and Evil in contemporary American society. In any event, if we wish our attempts at keeping the public peace to mirror the efficiency of Stalag 13, this is the model we should adopt.

2.
"...a never-ending battle for Truth, Justice, and the American Way."

Petitioner's view, which *Amicus* shares, sees law enforcement as a positive good in a democratic society: protecting the weak and defenseless from human predators is a core function of any government and, in a democracy, the police are the eyes and ears of the Law. While all power is subject to abuse, the solution is not to eliminate power, and place us at the mercy of the lawless; rather, the solution is for the Law to curb the abuse. Moreover, since Liberty is impossible without Order, *cf*, Rousseau, *supra;* Hobbes, *supra*, the occasional minor inconvenience for the sake of enforcing the Law is a price citizens must pay to live a free society. In this view, those charged with enforcing the Law should be intelligent in the execution of their duties, and alert to any signs of trouble. Police should be trained to spot anything that suggests criminal activity or mischief, and encouraged to take reasonable steps to investigate. In addition, police are admonished to use common sense in all dealings with the public — whether it means using their discretion to admonish, rather than punish, for a minor breach of the peace; or in assessing the degree of risk to public safety posed by action, or inaction, on their part.

Though perhaps not as conducive to pretty rhetoric, Petitioner's logic presents a more optimistic view of Society, and self-government, than that of Respondent: while human beings are capable of great cruelty and evil, they are also capable of kindness, nobility, and hope; and though evil may exist in the world, Society can keep it at bay through the institution of Law. Moreover, in a democratic Society, where Government exists to serve its citizens, those who enforce the Law are public servants, rather than public oppressors; and in a Society which values Liberty as well as law and order, the Law will craft the necessary compromises in order to achieve both. Accordingly, the Law will use common sense to protect freedom, as well as the weak and defenseless; and

courts will have little patience with apologists for criminal behavior, who claim a moral equivalence between clumsy efforts to enforce the Law, and callous attempts to break it.

Modesty, restraint, and an aversion to avoidable ridicule preclude *Amicus* from identifying the precise prototype for this view of law-enforcement officers, except to say that it comports with the idealized self-image of many members of the law enforcement community. However, as the sub-heading for this portion of the argument suggests, the model is somewhat more heroic than Respondent's ideal of Sgt. Schultz. Suffice it to say that in many cases, as here, it involves officers who go about their duties disguised as mild-mannered minions of a great metropolitan police department.

With these differences in outlook in mind, let us turn to the issue at hand:

C.
FLIGHT, SUSPICION, AND REASON

The underlying premise of the Illinois Supreme Court was that a citizen's act of fleeing from the presence of police justifies no legitimate police interest. This accepted as a given, it followed that the "flight alone is insufficient to create a reasonable suspicion of involvement in criminal conduct." *People v Wardlow*, at 701 NE2d 486. However, this Court can return reason to the Fourth Amendment by recognizing the fallacy in the first assumption of the syllogism, and acknowledging that while not justifying an arrest, flight does invite pursuit — and unprovoked flight from the presence of police invites an inquiry into the reason for such odd behavior.

The insight that a guilty conscience can cause one to run from shadows is as old as the Book of Proverbs, 28:1, and as timeless as the wisdom of Juvenal: "This is the first of punishments, that no guilty man is acquitted if judged by

himself."[16] SATIRES, xiii, 2. It was conscience that proved the undoing of the protagonist in *The Tell-Tale Heart*; and it was Dostoyevsky's realization that torment over one's own misdeeds can exact a heavier burden than the Law that breathed life into *Crime and Punishment*. Flight is, by its nature, an instinctive act of self-preservation that seeks to remove the actor from the presence of a perceived threat;[17] and if a citizen bolts in unprovoked flight at the sight of the police,[18] it is not unreasonable to infer that the action stems from a guilty conscience. *California v Hodari D, supra* at 499 US 623 n 1; *Michigan v Chestermut, supra* at 100 L ed 2d 574 (Kennedy, J, concurring). Courts do not, after all, hold police to impossible standards of prescience or precision, nor require them to form in their own minds the precise legal rationale that hindsight shows the circumstances justify, in order to render their conduct "reasonable" under the Fourth Amendment. *Scott* v *United States*, 436 US 128, 138 (1978); *People* v *Arterberry*, 431 Mich 381; 429 NW2d 574 (1988). And as flight is a sufficiently odd response to the appearance of police to warrant a reasonably prudent officer in concluding that "criminal activity may be afoot," it

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[16] *Amicus* notes that Juvenal was speaking of psychological punishment and honest self-judgment, rather than advocating the wide-scale restructuring of Roman legal institutions.

[17] *Cf*, Shakespeare, HENRY IV, PART I, V, iv, 120 (Noting that "[t]he better part of valor is discretion"); *see also*, Cleese, Idle, *et al*, M. PYTHON AND THE HOLY GRAIL, (1975), "Ballad of Brave, Brave, Brave Sir Robin, the Not-Quite-so-Brave-as-Sir-Lancelot":

"When danger reared its ugly head,
"He bravely turned his tail and fled...."

[18] Police could not, of course, provoke a citizen to flee — for instance, by threats of harassment or physical harm — and then use his subsequent efforts to avoid trouble as an excuse to detain him. Under those circumstances, however, the citizen's "flight" is readily understandable — and unreasonable police conduct in *provoking* one to flee could well render any subsequent seizure and detention unreasonable.

supplies the "articulable suspicion" necessary to warrant a further inquiry, *Terry v Ohio, supra* at 21-22, 30; *State* v *Anderson*, 155 Wis 2d 77, 84-85; 454 NW2d 763, 765-766 (1990), giving officers ample grounds to detain the fleer long enough to discover the cause of his flight.[19] *California v Hodari D, supra* at 499 US 623 n 1; *Michigan v Chesternut, supra* at 100 L Ed 2d 574 (Kennedy, J, concurring). *See also, State v Anderson, supra*; *Platt* v *State*, 589 NE2d 222, 226-227 (Ind, 1992).

Courts considering the implications of flight[20] largely

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[19]Actually, in *Sibron* v *New York*, 392 US 40, 66-67 (1968), this Court noted that "deliberately furtive actions and flight at the approach of strangers of the police are strong indicia of mens rea...." Therefore, the *Sibron* Court held, "when coupled with specific knowledge...relating the suspect to the evidence of crime," they could justify an arrest upon probable cause. Simple logic would seem to hold that if flight (*mens rea)* + specific evidence of a crime = probable cause, then evidence of flight would suffice for "articulable suspicion." And this appears to be the position of Professor LaFave. LaFave, 4 SEARCH AND SEIZURE (3D ED), §9.4(f), p 181-182 (1996).

[20]Jurisdictions holding mere flight to be insufficient to justify police interest all appear to view flight upon the approach of the police as "simply...the exercise — at top speed — of the person's constitutional right to move on." *See, eg, State* v *Hicks*, 241 Neb 357, 363; 488 NW2d 359, 364 (1992); *People v Shabaz, supra* at 378 NW2d 460; *People v Wardlow, supra* at 701 NE2d 487. This appears to overlook the importance of context in assessing one's behavior: those who bolt from police presence in one context — at the starting line of a 10 kilometer run, for example — suggest one thing by their actions; those who bolt from an officer's presence in another context, such as a dark street at 3:00 am, *see, People v Souza, supra,* or without a discernible reason, *State v Anderson, supra*, may suggest something quite different. But jurisdictions which scoff at the proverbial common sense of PROVERBS, 28:1 not only deprive the police of the ability to use common sense: they also appear to ignore the fact that time and again, events proved the officers' suspicions to be correct. *See, eg, Hicks, supra; Shabaz, supra, Wardlow, supra. See also, People* v *Talbot*, 792 P2d 489 (Utah App, 1990); *People* v *Holmes*, 81 NY2d 1056; 619 NE2d 396 (1993).

While *Amicus* does not claim that hindsight alone can excuse an

concur: drawing upon the anticipated reaction of drug dealers to the approach of police, for example, the Connecticut Court of Appeals held that police action in seizing those fleeing through the rear of a restaurant, when other officers approached the scene of reported, though unobservable, drug activity from the front, constituted a *Terry*-stop on reasonable, articulable suspicion, *State* v *Williamson*, 10 Conn App 532; 524 A2d 655, 659-660 (Conn App, 1987). The Indiana Supreme Court, recognizing that "suspicious conduct by its very nature is ambiguous," observed that "[f]light at the sight of police is undeniably suspicious behavior," and therefore approved the investigative detention of a motorist who fled from the scene in great haste, when a police car pulled up behind his parked vehicle. *Platt* v *State*, 589 NE2d 222, 225-227 (Ind, 1992). Similarly, the Sixth Circuit has noted that "[f]light invites pursuit," and that flight "from a clearly identified law enforcement officer may furnish sufficient ground for a limited investigative stop," *United States* v *Pope*, 561 F2d 663, 668-669 (CA 6, 1977); *see also, United States* v *Lane*, 909 F2d 895 (CA 6, 1990), and most other Circuits concur. *See, eg, United States* v *Rundel*, 461 F2d 860 (CA 3, 1972); *United States* v *Haye*, 825 F2d 32 (CA 4, 1987); *United States* v *Vasquez*, 534 F2d 1142 (CA 5, 1976); *United States* v *Cardona-Rivera*, 904 F2d 1149)CA 7, 1990); *United States* v *Jackson*, 741 F2d 223 (CA 8, 1984).

Perhaps the best treatment of the issue, however, comes from the Wisconsin Supreme Court decision in *State v Anderson, supra*: in that case, as here, the fled at the approach of identifiable police cars, and police pursued him to determine the cause of his flight. Noting that the critical

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unreasonable action, the consistency with which those who bolt from the presence of the police turn out to be engaged in criminal misconduct might strike an objective observer as reason enough for second thoughts about the wisdom of the *Shabaz* view of the neutral implications of panicked flight.

Fourth Amendment question turned on the reasonableness of police conduct under the facts and circumstances confronting them, the court reasoned that since "reasonableness is a common sense test," the appropriate question was not whether the circumstances were amenable to differing interpretations, but rather "what is reasonable under the circumstances" — or, more specifically: "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v Anderson*, at 454 NW2d 765. In this view, the relevant concern was not certainty, but ambiguity — and resolving that ambiguity was the whole point of an investigative detention under *Terry*:

> "[P]olice officers are not required to rule out the possibility of innocent behavior before initiating a brief stop....[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences...the officers have the right to temporarily detain the individual for purposes of inquiry.
>
> "Flight at the sight of police is undeniably suspicious behavior. Although many innocent explanations could be hypothesized as the reason for the flight, a reasonable police officer who is charged with enforcing the law as well as maintaining peace and order cannot ignore the inference that criminal activity may well be afoot. Although it does not rise to a level of probable cause, flight at the sight of a police officer certainly gives rise to a reasonable suspicion that all is not well. Under these circumstances, it would have been poor police work indeed for an officer to have failed to investigate this behavior further." *State v Anderson*, at 454 NW2d 766 (Citations omitted).

The legal construction of "reasonableness" which the Illinois Supreme Court places upon the Fourth Amendment needlessly constricts the ability of police officers to note and draw inferences from the reaction of those around them, and rejects a wisdom that reaches back into Antiquity, *see*, PROVERBS, 28:1, teaching us that the panic stemming from a guilty conscience induces flight — or other, similarly odd behavior[21] — even when there is no danger. This holding is inconsistent with the application of reason to human interaction, and ignores the common sense that each of us bring to our lives every day; even worse, such a view of the Fourth Amendment would carve this misguided, stubbornly obtuse view of human nature into stone.

Granted that courts are final arbiter of what is "reasonable" under our Constitution, *Amicus* submits that courts should be careful not to intrude too far into areas beyond their experience or expertise.[22] It is, after all, the police, and not the courts, who deal with crime and criminals on a daily basis; and it is the police, not the courts, who are ultimately charged with keeping our streets safe, and our property secure. Therefore, except under extreme circumstances, courts should respect their experience in determining what actions are necessary or useful to maintain

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[21]In point of fact, there will be many factors a well-trained police officer will notice, in assessing what is going on around him — including the reactions of others to his own presence or appearance on the scene. *See, eg*, Tiffany, McIntyre, and Rottenberg, DETECTION OF CRIME (1967). *See also*, LaFave, *supra* at §9.4(f), pp 176ff.

[22]As one authority has noted: "Law teachers apart, judges should perhaps be the last to lay claim to any special knowledge of the workings of ordinary human nature." Wise, *Criminal Law & Procedure: 1974 Annual Survey of Michigan Law*, 21 WAYNE L REV 401, 424 (1975).

law and order on streets, and to ensure that the rule of Law, rather than that of the Jungle, prevails in our society. US CONST, Art III.

Accordingly, the Illinois Supreme Court holding below is based upon flawed reading of the Fourth Amendment, and cannot provide a basis for suppressing evidence in this case.

D.

CONCLUSION

It appears consistent with both the purpose and scope of the Fourth Amendment to hold that one's unprovoked flight from the presence of police provides the justification for a second-tier encounter under this Court's decisions in *Terry v Ohio*, and *Florida v Royer*. *Cf, California v Hodari D*, at 623 n 1; *Michigan v Chesternut*, (Kennedy, J., concurring). While not unlawful, at the very least such a reaction suggests an actor who regards the Law as a threat, and is therefore inherently suspicious. *State v Anderson, supra*; *Platt v State, supra*. While even one with nothing to hide may feel uncomfortable at the official attention, the Constitution does not guarantee that law enforcement will be faceless; and, until now, courts have refrained from construing our Constitution in such a way as to discourage police from venturing out onto the streets, for fear of upsetting those with fragile nerves.

Amicus submits that the mere presence of police is a reassurance to those for whom the Law is a protector, rather than an adversary; the only one to whom such a presence is a threat is one with guilty conscience — and an objective manifestation of that guilty conscience provides police with sufficient grounds to investigate. The contrary rule, requiring police to look away and pretend they saw nothing, not only forces them to ignore the evidence of their senses, but also teaches them to suppress the protective instincts that a good policeman needs to execute his duty. Such an outcome is inconsistent with the function of the police in a democratic society, in that forbidding an officer from discovering what is going on within the range of his own senses severs the Law from its own eyes and ears. More importantly, by

demonstrating the Law's inability or unwillingness to keep attuned to the nuances of daily life, it subverts the very purpose of the Law for the sake of rhetoric, disheartening those who look to the Law for protection, encouraging those for whom the Law is an enemy.

Courts have recognized the need to maintain the confidence and respect of the public, and avoid "subject[ing] an already much maligned system to further ridicule." *People v Moore*, 432 Mich 311, 325-326; 439 NW2d 684 (1989). The need to correct the holding of the lower court should therefore be apparent: Such a decision not only conflicts with common sense, common perceptions, and common experience, but is also dangerous to public safety, positively destructive of public order, and likely to make the public even more despairing of the ability of our democratic institutions to make democracy work — a system of governance which requires a Government able to enforce a rule of law, impose some measure of civility on life, and assure the safety and security needed for freedom to flourish and law-abiding citizens to prosper. *Amicus* submits that any regime that forbids the use of insights into ordinary human nature weakens the ability of Government to protect its citizens from harm — and without confidence in the ability of Government to fulfill this basic function, our dreams of ordered liberty would crumble to dust, like withered parchment. *Cf*, US CONST, Preamble; *Leviathan, supra; The Social Contract, supra*.

The Constitution does not forbid reasonable actions to enforce the Law or maintain public peace, and no Legislative enactment limits the power of police to chase after people who bolt from their presence. As the Constitution grants courts no legislative power, US CONST, Art III, 1-2, judges may not adopt such a rule as a matter of policy. Thus, absent

circumstances which readily explain the action,[23] one who bolts at the sight of police has no reason to complain when they begin wondering about the matter, nor fault them for trying to determine why their mere presence would strike someone as a threat.

Accordingly, the lower court decision in this case is in error, and this Court should reverse.

RELIEF

WHEREFORE, this Court should reverse the holding of the Illinois Supreme Court.

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Dated: June 21, 1999
JC/eb

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[23] *Amicus* notes that, under the "totality of circumstances," *cf. United States v Sokolow*, at 7-8, the explanation for some such actions might be self-evident: the presence of fully-armed riot police, for example, are *intended* to make people disperse, as quickly as possible; and the sudden appearance of a host of squad cars, accompanied by armed officers clad in flak-jackets could well induce many prudent, law-abiding citizens to run for cover at flank speed.

On the other hand, the most likely explanation why a citizen would bolt from the mere presence of an officer is the citizen's own guilty conscience.